

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JULIA J. GIVEN)	
Claimant)	
V.)	
)	
SOUTH WIND HOSPICE, INC.)	
Respondent)	Docket No. 1,038,995
AND)	
)	
TRAVELERS INDEMNITY COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the October 17, 2014, Post-Award Medical Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

Phillip B. Slape of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

RECORD

The record considered by the Board is listed in the Post-Award Medical Award; the August 12, 2009, regular hearing transcript and exhibits thereto; and the September 14, 2009, settlement hearing transcript and attachments thereto, except any medical records.

ISSUES

ALJ Klein found:

The court is convinced by the testimony of the claimant and Dr. Razafindrabe that the walk in tub will alleviate some of the claimant's pain and assist in improving her quality of life. The court orders the respondent to provide a walk in tub to the claimant.¹

¹ ALJ Post-Award Medical Award at 2.

Respondent appeals and asserts Dr. Bell Razafindrabe, claimant's authorized treating physician, does not believe the walk-in bathtub is medically necessary for claimant's condition and, therefore, the walk-in bathtub is not reasonably necessary to cure and relieve claimant from the effects of her work-related injury. Respondent asks claimant's request for the walk-in bathtub be denied.

Claimant contends she proved the need for the walk-in bathtub is both necessary and reasonable treatment for her work-related low back injury.

The sole issue before the Board on this appeal is whether a walk-in bathtub is necessary to cure or relieve claimant from the effects of her injury.

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds:

Claimant sustained a work-related low back injury on November 24, 2007. She underwent low back surgery in March 2008. At the regular hearing, claimant testified she has used a cane since shortly after her surgery because of losing her balance. Claimant settled her claim on September 14, 2009, for a lump sum of \$90,000. The issue of future medical treatment was left open.

On November 21, 2013, claimant filed an Application for Post Award Medical, requesting authorization of Dr. Razafindrabe and his recommendations, including a "jacuzzi walk-in tub."²

At the post-award medical hearing, claimant testified she took Percocet 10 four to six times a day, Robaxin three times a day and Viscodyl. She also uses a TENS unit. Claimant testified her condition is worse than it was right after her 2008 surgery. She cannot stand for very long periods of time, falls more and gets the most relief when she lies down on her side and stretches out. Claimant testified Dr. Razafindrabe prescribed epidural injections, but she is allergic to the steroids.

Claimant indicated she is requesting a bathtub with a door she can open so she can walk into the tub. The bathtub she is requesting also has jets that massage her back and leg muscles. She currently has a plain bathtub, but does not use it because she cannot get out of it. Claimant indicated at the post-award medical hearing that two to three months prior to the hearing, she used her neighbor's walk-in bathtub three or four times in a month's time.

² Razafindrabe Depo. at 12.

Dr. Razafindrabe testified he began seeing claimant on April 1, 2013. He indicated claimant was referred by respondent's insurance carrier. Claimant's main complaints were back and leg pain. The doctor sees claimant monthly for pain management. His treatment of claimant primarily consists of prescribing medications, but he was likely to recommend therapy within the next three months.

Dr. Razafindrabe indicated that when he met with claimant on November 6, 2013, she mentioned getting pain relief when she used a bathtub with a door. Dr. Razafindrabe confirmed claimant requested he give her a prescription for a "jacuzzi walk-in tub."³ When asked why she would need a walk-in bathtub, the doctor testified: "she had difficulty because of her chronic pain and the tub that has opening, walk into a tub at the same level provides less bother for her to get into the tub."⁴ The doctor also testified:

Q. Did she describe to you that use of that tub that she had used was helping her sleep better at night?

A. Yes, sir.

Q. Is that important at all that she sleeps well at night to the overall picture from a pain management perspective?

A. Yes, sir.

Q. And why is that important, Doctor?

A. It will help her have less sensitivity to pain during the day if she sleeps well at night.⁵

In notes from a December 4, 2013, visit, Dr. Razafindrabe indicated a walk-in bathtub might give claimant comfort and help her bathe, but was not necessarily a must have medically. The doctor testified:

Q. Do you believe it's medically necessary for her to have this walk-in bathtub as a result of this injury?

A. If you say medical necessity if it make worse if you don't have it, that's not the case, but if you would say to help your pain and quality of life, it does.⁶

³ *Id.* at 12, 16.

⁴ *Id.* at 11.

⁵ *Id.* at 12-13.

⁶ *Id.* at 17.

Dr. Razafindrabe acknowledged he usually does not prescribe the type of bathtub claimant requested. When asked if he would have prescribed the bathtub had claimant not requested it, the doctor responded: "Based on her testimony that she tried one and it helped her and I found that it would be reasonable to prescribe if she hadn't have any full relief on what she's getting now on pain medications."⁷

According to Dr. Razafindrabe, claimant has leg pain that affects her ability to step into something higher and would benefit from a walk-in bathtub. When asked if the walk-in bathtub he prescribed would be reasonably necessary to cure and relieve the effects of her injury, the doctor replied: "I don't think this will cure it. It will a [sic] attenuate the pain. It's mainly for quality of life. As I said, if she doesn't have it, it does not make it worse."⁸

Following Dr. Razafindrabe's deposition, claimant was deposed. She testified that since surgery, she has numbness in her right leg and it does not do what it is supposed to do. She uses a cane and uses a grab bar to step over her bathtub edge when she showers. Claimant explained her shower is in her current bathtub, which is approximately 18 inches deep. Sometimes her leg does not go high enough to get over the bathtub edge and she has fallen getting in and out of the bathtub. She indicated that sometimes she stands while showering and other times she sits on a chair in the shower.

Claimant testified that when she used her neighbor's tub, she slept better. She did not have to get up during the night to take her medications because of having pain.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁹ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."¹⁰

K.S.A. 2007 Supp. 44-510k(a) states:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned

⁷ *Id.* at 16.

⁸ *Id.* at 18.

⁹ K.S.A. 2007 Supp. 44-501(a).

¹⁰ K.S.A. 2007 Supp. 44-508(g).

administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

The Board has heard numerous appeals where an ALJ granted or denied a claimant's request for items that are not normally considered a medical expense. In *Clover*,¹¹ the Board granted claimant's request for a walk-in bathtub because of balance issues and the threat of falls while bathing. In *Gawdun*,¹² the Board affirmed a post-award medical award for a YWCA membership because swimming in the YWCA pool and use of the hot tub and sauna relieved the effects of claimant's work injury. The Board has, under certain circumstances, determined that such things as a hot tub,¹³ a computer,¹⁴ and a mattress¹⁵ constituted medical treatment. The Kansas Court of Appeals has held that a custom-made brassiere is reasonable medical treatment.¹⁶

As pointed out by a Board Member in a previous order, the problem with trying to separate what is a reasonable medical necessity from what is dictated by convenience and/or lifestyle is that these two categories can sometimes overlap. The ultimate question is whether the walk-in bathtub Dr. Razafindrabe prescribed is reasonable or necessary to cure or relieve claimant from the effects of the injury.

The Board affirms the Post-Award Medical Award. Dr. Razafindrabe indicated a walk-in bathtub would allow claimant to sleep better at night, reducing her sensitivity to pain during the day. Claimant testified she did not use medication during the nights after she used a neighbor's walk-in bathtub. Claimant and Dr. Razafindrabe's testimony is

¹¹ *Clover v. YRC Incorporated*, No. 1,039,449, 2014 WL 1340585 (Kan. WCAB Mar. 10, 2014).

¹² *Gawdun v. State of Kansas*, No. 1,059,846, 2013 WL 6920084 (Kan. WCAB Dec 3, 2013).

¹³ *Fernandez v. Safelite Auto Glass*, No. 244,854, 2002 WL 31828620 (Kan. WCAB Nov. 20, 2002).

¹⁴ *Fletcher v. Roberson Lumber Company*, No. 231,570, 1999 WL 195653 (Kan. WCAB Mar. 1999).

¹⁵ *Conner v. Devlin Partners, LLC*, No. 1,007,224, 2005 WL 831913 (Kan. WCAB Mar. 11, 2005).

¹⁶ *Van Gorden v. IBP, Inc.*, Nos. 84,110 & 84,173 (Kansas Court of Appeals unpublished opinion filed Oct. 27, 2000).

uncontroverted that using a “jacuzzi walk-in tub” helped attenuate or relieve claimant’s pain.

The Board also finds persuasive claimant’s testimony about the issues she has with her right leg and the problems she has with showering. She has difficulty getting her right leg over the edge of her current bathtub and has fallen getting in and out of the bathtub. Claimant must use a grab bar and sometimes sits on a chair while showering. The Board, as in *Clover*, grants claimant’s request for a walk-in bathtub because of the risk claimant’s current bathtub poses to her falling and injuring herself more severely.

CONCLUSION

The Board affirms the ALJ’s implied finding that a walk-in tub is reasonable or necessary to cure or relieve the effects of claimant’s work injury.

WHEREFORE, the Board affirms the October 17, 2014, Post-Award Medical Award entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of December, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Thomas Klein, Administrative Law Judge